SUPREME COURT, U. S.

FILED

No. 48

In the Supreme Court of the United States

OCTOBER TERM, 1970

LOUIS P. [illegible], PETITIONER

v.

UNITED STATES OF [illegible]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 431

LOUIS P. KURFESS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 3, 1970. A petition for rehearing was denied on June 25, 1970. The petition for a writ of certiorari was filed July 21, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence supports petitioner's conviction for clandestinely bringing goods into the country.

2. Whether the trial judge improperly coerced the defense into stipulating to the petitioner's reputation and improperly instructed the jury as to reputation.

3. Whether the petitioner's constitutional rights were violated by a warrantless border search by customs agents.

4. Whether the petitioner's out-of-court statements were improperly admitted into evidence.

5. Whether the petitioner had effective assistance of his retained counsel.

STATEMENT

Petitioner was convicted after a jury trial in the United States District Court for the Northern District of Illinois of willfully and knowingly smuggling goods into the country with the intent to defraud the United States in violation of 18 U.S.C. 545 (Tr. 165-169). He was sentenced to two years' imprisonment, subject to the provisions of 18 U.S.C. 4208(a)(2), and fined $5,000 (Tr. 182-183).

The evidence at trial[1] showed that petitioner and his wife, returning to Chicago from Europe, presented seven articles of baggage and a customs declaration to the customs agent at the airport (Tr. 10).

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[1] There was also a pre-trial hearing on petitioner's motion to suppress at which petitioner alone testified.

The agent, Schuessler, asked the petitioner if he had anything more to declare and the petitioner responded that he did not (Tr. 10-11). The agent examined two suitcases, a small hand bag, and one box which contained watches. Petitioner said he had acquired them in the United States and taken them to Germany for repair (Tr. 11). Agent Schuessler testified that he again asked petitioner whether he had declared everything and that petitioner said he had (Tr. 15). The agent charged petitioner duty on some surplus liquor and called two other agents for a more thorough search (Tr. 15).

One of the agents, Serra, testified that he asked petitioner whether he had declared everything and that the petitioner responded that he had (Tr. 30-32).[2] Agent Serra opened one of the boxes and discovered approximately 100 watches with foreign workings (Tr. 32). He then informed petitioner of his constitutional rights and the petitioner responded "Yes, I know all that" (Tr. 32-33). Petitioner told the agents he had purchased the items found in the boxes in Europe (Tr. 52-53, see also Tr. 60-69). He said that he did not think that he was required to declare these items because they were antiques (Tr. 77).

Petitioner testified, as he had on the motion to suppress, that he had been cleared by the first agent and was delivering his bags to a porter before he was ap-

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[2] Petitioner's counsel objected to the question that elicited this testimony and indicated that he desired that his objection be heard outside the presence of the jury (Tr. 30-31). The trial judge, without excusing the jury, denied the motion (Tr. 31).

proached by agents who later searched his bags (Tr. 82-87). In rebuttal, agent Schuessler testified that he never told the petitioner he could close his bags and go (Tr. 106).

ARGUMENT

1. Petitioner contends that since he presented all his baggage to the customs inspector, the evidence did not show that he "clandestinely" brought goods into the United States (Pet. 25-27). As the court below held, however, "smuggle" and "clandestinely introduce" refer to the acts of a defendant in surreptitiously, by concealment or fraud, avoiding customs and introducing goods into the United States. *United States* v. *Claybourn*, 180 F. Supp. 448, 451 (S.D. Cal.). It is immaterial that the boxes were available for inspection. Petitioner violated the statute when he attempted to avoid inspection by fraudulently representing to the customs agents what the boxes contained and by fraudulently stating that he had declared everything. See *United States* v. *Ritterman*, 273 U.S. 261. For the reasons stated by the court below, the government was not required to show that the goods were subject to duty. *United States* v. *McKee*, 220 F.2d 266, 269 (C.A. 2)

2. The record does not support petitioner's contention that the trial judge improperly coerced the defense into stipulating to the petitioner's reputation. Toward the close of trial his counsel indicated that certain witnesses were not present. The trial judge stated that he would not adjourn until later (Tr. 104). After a discussion on instructions, petitioner's

counsel suggested that the Assistant United States Attorney might stipulate that, if these witnesses were called, they would testify that the petitioner had a good reputation in the community (Tr. 118-119). Initially, the Assistant United States Attorney refused (Tr. 118). The trial judge stated that he did not care whether the government stipulated or forced petitioner to bring the witnesses down in the morning (Tr. 124). The Assistant United States Attorney then agreed to stipulate and the petitioner's counsel responded that it would expedite the hearing (Tr. 124). A stipulation was then read to the jury (Tr. 124, 126-128).

The defense did not object to the instruction on character evidence, which was in any event proper. The court instructed the jury to consider all the evidence in the case, including character evidence, but directed them not to use character evidence as an excuse to acquit if they believed, after considering all the evidence, that the defendant was guilty beyond a reasonable doubt. This instruction did not render the character evidence worthless, but correctly emphasized to the jury its proper place in relation to the other evidence. See *United States* v. *Echeles*, 222 F. 2d 144, 160 (C.A. 7), certiorari denied, 350 U.S. 828. See also *United States* v. *Winter*, 38 F. Supp. 627, 628 (E.D. Pa.).[3]

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[3] Petitioner also contends that the court, in giving an instruction commenting on the fact that he had testified in the case, improperly singled him out (Pet. 20-22). The trial court properly gave a specific instruction warning the jury not to disbelieve him merely because he was the defendant. At the

3. Petitioner contends that he had completed customs examination after the search and assessment of duty by agent Schuessler and that the subsequent search by the other agents therefore was not a "border search" and was invalid without a warrant. Petitioner had not, however, cleared customs. Immediately after conducting his examination, agent Schuessler requested the other two agents to continue the examination in a private room. Even assuming that petitioner did in fact pass through one customs check, he was not thereby made immune from further examination by customs agents. *Morales* v. *United States*, 378 F. 2d 187, 190 (C.A. 5); *Thomas* v. *United States*, 372 F. 2d 252, 254 (C.A. 5).

4. As the court of appeals held, petitioner's statements to the second agents, before the bags were opened, that he had nothing more to declare, were not inadmissible because the agents had not given *Miranda* warnings. *Chavez-Martinez* v. *United States*, 407 F. 2d 535 (C.A. 9), certiorari denied, 396 U.S. 858. Since the absence of warnings at that point was undisputed, there was no real reason to hold a hearing on the admissibility of the statements. In any event, the failure to do so was harmless error. *United States* v. *De La Cruz*, 420 F. 2d 1093 (C.A. 7), cited by petitioner (Pet. 18), requires *Miranda* warnings only *after* a person is found to be concealing suspicious material. Once the agents found the watches, they gave warnings here. Petitioner's response,

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same time, the court also pointed out that, in evaluating his testimony, the jury could consider his interest in the case as the defendant.

"Yes, I know all that," and the fact that he, an intelligent and successful businessman (Tr. 170-173), then answered the agents' questions, free from threats or promises, demonstrate an affirmative waiver of his rights under *Miranda*. See, *United States* v. *Thompson*, 417 F. 2d 196, 197 (C.A. 4), certiorari denied, 396 U.S. 1047; *Keegan* v. *United States*, 385 F. 2d 260, 262-264 (C.A. 9), certiorari denied, 391 U.S. 967.

5. Petitioner's retained counsel several times stated he was not prepared. He filed pre-trial motions late although the court considered them and permitted filing of the motion to suppress, the only one found to be substantial. When the government moved to introduce several exhibits (including the customs declaration and the box) into evidence (Tr. 16), petitioner's counsel objected but stated that he was unfamiliar with the exhibits and had no questions concerning them (Tr. 17). The exhibits were admitted, subject to the objection (Tr. 18) which subsequently was heard outside the presence of the jury and denied (Tr. 36-37). When instructions were discussed on the afternoon of trial, petitioner's counsel indicated he did not have his instructions with him (Tr. 110). The court examined the instructions tendered by the government and eliminated several (Tr. 110). Petitioner's counsel objected to one and it was withdrawn (Tr. 111-112).

Considering the overwhelming evidence of guilt, it is not clear whether counsel was deliberate or careless. He seems to have been prepared for such significant matters as objecting to testimony as to peti-

tioner's statements. In any event, his representation was not so faulty as to amount to ineffective assistance of counsel.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST 1970.

CERTIORARI DENIED

N.C.R.

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